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No. ___

IN THE

Supreme Court of the United States

DONNOVAN BULGIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Where a sentence is imposed in excess of the statutory maximum invoked by the elements of the offense alleged in the indictment and found by the jury, does such a sentence exceed the jurisdiction of the district court and therefore constitute *per se* reversible error?

II. If the Court determines that plain error review applies, whether the imposition of a sentence in excess of the statutory maximum is plain error because it affects the defendant's substantial rights and the fairness and integrity of the judicial proceeding and there is conflict among the circuits as to this issue.

III. Whether a law enforcement officer has a good faith basis to believe a third party has apparent authority to give consent to search a vehicle when the police officer knows that the third party does not own the vehicle and the third party is not in actual possession of the vehicle when the officer obtains consent for the search.

IV. Whether the imposition of an enhanced sentence for illegally reentering the United States after deportation pursuant to 8 U.S.C. § 1326(b)(2), violates the Fifth and Sixth Amendments in light of *Apprendi v. New Jersey* 530 U.S.466 (2000) when the indictment failed to allege that the deportation was subsequent to a conviction for an aggravated felony?

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PETITION FOR A WRIT OF CERTIORARI

Donnovan Bulgin respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 00-14543-DD in that court on June 14, 2001, *United States v. Donnovan Bulgin*, an unpublished opinion, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 14, 2001. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provisions:

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

> (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . . . If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release. . . Any sentence under this subparagraph shall, if there was a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment . . .

(1)(B) In the case of a violation of subsection (a) of this section involving—

> (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years. . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . Any sentence imposed under this subparagraph shall, . . . if there was [] a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. . . .

(1)(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . Any sentence imposing a term of

imprisonment under this paragraph shall, in the absence of a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprison ment . . .

8 U.S.C. § 1326

(a) Subject to subsection (b) of this section, any alien who—

(1) has been ..... deported ...., and thereafter

(2) ..... is at any time found in the United States, unless (A) prior to his re-embarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission..... shall be fined under Title 18 and imprisoned not more than 2 years.

(b) Criminal Penalties for reentry of certain removed aliens Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both...

STATEMENT OF THE CASE

The Indictment

On April 14, 2000, the government filed a three count indictment against petitioner Bulgin. Count one of the indictment alleged that from 1995 to March 3, 2000, Mr. Bulgin knowingly and intentionally conspired to distribute a Schedule II controlled substance, that is, a mixture and substance

containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United states Code, Section 846.

Count two of the indictment charged that on March 3, 2000, Mr. Bulgin knowingly and intentionally possessed with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1). Counts one and two contained no allegations as to the amount of cocaine. R1:16

Count three of the indictment charged Mr. Bulgin with knowing and unlawful presence in the United States after having been previously deported without the Attorney General having expressly consented to Mr. Bulgin reapplying for admission. In count four of the indictment, the government sought forfeiture pursuant to 21 U.S.C. 21 853. On June 5, 2000, Mr. Bulgin pled guilty to the illegal reentry count and a jury was selected for the trial on the conspiracy and possession of cocaine counts.

The Motion to Suppress

Prior to the jury being sworn, the district court heard Mr. Bulgin's motion to suppress evidence. Between March 1, 2000 and March 3, 2000, Officer Wallace Vance of the Coral Gables Police Department was part of a task force conducting surveillance on Grantly Calvin who was suspected of drug trafficking and money laundering. On March 1, Mr. Calvin was observed at the Palm Beach County Jail posting a bond for Mr. Bulgin who had been arrested for domestic violence. After Mr. Bulgin was released, the law enforcement officers followed Bulgin and Calvin to Bulgin's residence in Wellington, Florida.

On March 2, 2000, beginning at approximately 7:30 a.m., law enforcement officers continued their surveillance of Grantly Calvin. Sometime during the late afternoon or early evening, Officer Vance observed Mr. Calvin with Mr. Bulgin

in Palm Beach. Officer Vance observed Mr. Bulgin and Mr. Calvin transport some gym equipment to a residence in Miramar and move vehicles in out of the garage. The surveillance was discontinued at 1:00 a.m.

On March 3, 2000, the surveillance resumed at 7:30 a.m. Law enforcement officers followed Mr. Calvin to an auto dealership where Mr. Calvin bought some auto parts. Mr. Calvin then proceeded to an address in Broward County, where he met two or three individuals in a parking lot. At 3:30 in the afternoon, Officer Vance conducted a traffic stop on Mr. Calvin's vehicle. Officer Vance told Mr. Calvin that he knew of Mr. Bulgin's and Mr. Calvin's money laundering and drug activities, and that Mr. Bulgin had already been arrested. Mr. Calvin agreed to cooperate and consented to a search of his residence in Pembroke Pines.

Mr. Calvin advised the officer that he had a large bag of money hidden at his residence that Mr. Bulgin had given him to hold because Mr. Bulgin did not want his wife to find the money. The police searched Mr. Calvin's residence and seized over $500,00.00 in cash and two firearms. Mr. Calvin also gave Officer Vance written consent to search Mr. Bulgin's vehicle, which was parked at another residence in Pembroke Pines. The search of Mr. Bulgin's vehicle uncovered ninety kilograms of cocaine.

During the motion to suppress, Mr. Calvin testified that he and Bulgin loaded thee boxes into the vehicle on March 2nd at approximately 5:00 p.m., that Bulgin asked him to take the vehicle and Bulgin would pick the car up the next day. At the motion to suppress, Mr Bulgin argued that Mr. Calvin did not have the authority to give valid consent to the warrantless search of his vehicle. The district court denied the motion to suppress reasoning that Mr. Calvin had authority to give consent to the search because less than 24 hours had passed from the time Mr. Bulgin had given authority to drive and park the vehicle.

The Trial

The trial began on June 6 and ended on June 9, 2000. At trial, Mr. Calvin testified for the government as a cooperating witness. Mr Calvin testified that sometime in 1995 he assisted Mr. Bulgin with the purchase of one kilogram of cocaine for $18,000.00. After the first transaction, Mr. Calvin testified that he participated in a total of nine cocaine transactions with Mr. Bulgin in 1995. The first two transactions were for one kilogram, two transactions were for two kilograms, two transactions were for five kilograms and two transactions were for ten kilograms and one transaction was for twenty kilograms. Mr. Calvin further testified that Mr. Bulgin also purchased ten kilograms from him in 1999.

On cross examination, Mr. Bulgin admitted that he had recently pled guilty to the instant offense and another cocaine conspiracy offense involving his girlfriend. He also admitted that he had entered into a plea agreement with the government and that he hoped to receive a recommendation for a lenient sentence in exchange for his cooperation.

In addition to Mr. Calvin, Ms. El Holloway testified for the government. The government gave Ms. Holloway immunity in exchange for her testimony. Ms Holloway testified that she met and began dating Mr. Bulgin in 1994. She also stated that Mr. Bulgin paid cash for the house in Wellington and that she saw Bulgin count large sums of money on a number of occasions. In addition, Ms. Holloway testified that she saw Mr. Bulgin in possession of narcotics in 1999.

On cross examination, Ms. Holloway admitted that she and Mr. Bulgin had a recent altercation and that the government had advised her that she could have been charged with money laundering. Ms. Holloway also admitted that she had planned to end her relationship with Mr. Bulgin. The defense did not call any witnesses and the district court denied Mr. Bulgin's motion for judgment of acquittal as to both counts.

After closing arguments, the district court instructed the jury as to elements of counts one and count two. However, the district court did not instruct the jury to make a finding as to the amount of cocaine Mr. Bulgin conspired to possess or actually possessed. The jury convicted Mr. Bulgin of count one, the conspiracy count and acquitted him of count two, the possession count. The jury also returned a verdict in favor of the government on the forfeiture count.

The Sentencing Hearing

The sentencing hearing was held on August 17, 2000. As to the cocaine conspiracy count, the Pre-Sentence Investigation Report (PSI) concluded that the statutory required minimum penalty was life imprisonment pursuant to 21 U.S.C. § 21 U.S.C. 841(b)(1)(A). The PSI also claimed that the offense involved between 50 and 150 kilograms of cocaine, therefore Mr. Bulgin's base offense level was 36.

As to the illegal reentry count, Mr. Bulgin was assessed a sixteen level increase from base offense level 8 because the PSI determined that Mr. Bulgin had been previously convicted of an aggravated felony prior to his deportation. Accordingly, the PSI concluded that the maximum penalty was twenty years imprisonment pursuant to 8 U.S.C. § 1326 (b)(2).

Prior to the sentencing hearing, Mr. Bulgin filed objections to the PSI. Mr. Bulgin objected to the PSI finding that the statutory penalty for the offense of conviction was life imprisonment. Citing *Apprendi v. New Jersey*, Mr. Bulgin argued that because the indictment failed to allege any amount of cocaine, the jury convicted him of the offense described by 21 U.S.C. § 841(b)(1)(C), which is punishable by a maximum penalty of twenty years. Mr. Bulgin specifically objected to the the PSI finding that the offense involved between fifty and one hundred-fifty kilograms of

cocaine and that he should be held responsible for possessing ninety kilograms of cocaine in light of the jury's acquittal on the possession count.

In addition, Mr. Bulgin objected to the sixteen level increase to the base offense level for the illegal reentry count, arguing that the Apprendi decision required the fact of the prior conviction for the aggravated felony to be pled in the indictment and proved to a jury beyond a reasonable doubt.

The district court rejected Mr. Bulgin's *Apprendi* argument. Citing *United States v. Hester*, 199 F.2d 1287 (11th Cir. 2000), the district court ruled that drug quantity was not an element of the offense and was merely a sentencing factor which only required proof by a preponderance of the evidence. The district court found that the evidence was sufficient to support a finding of at least forty kilograms of cocaine and overruled Mr. Bulgin's objection as to the PSI finding of ninety kilograms of cocaine. In addition, the district court also overruled Mr. Bulgin's objection to the sixteen level increase for the illegal reentry count. The district court sentenced Mr. Bulgin to life imprisonment for the cocaine conspiracy count and twenty years for the illegal reentry count, to be served concurrently.

The Eleventh Circuit Decision

Mr. Bulgin timely filed a Notice of Appeal. In an unpublished opinion entered on June 14, 2001, the Eleventh Circuit affirmed Mr. Bulgin's conviction and sentence. While the Eleventh Circuit acknowledged that pursuant to *Apprendi,* drug quantity constitutes an element of the offense which must be charged in the indictment and proven beyond a reasonable doubt, the Eleventh Circuit ruled that an *Apprendi* error is subject to harmless error analysis and the error is harmless if the record does not contain evidence that could rationally lead to a contrary finding with respect to drug quantity. Without making a finding as to any specific amount

of cocaine, the Eleventh Circuit found that the evidence was overwhelming that the conspiracy involved a sufficient amount of cocaine to support the imposition of a life sentence.

In affirming the 20 year sentence for the illegal re-entry count, the Eleventh Circuit *held* that *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) remains the law of the land. With respect to the motion to suppress, the Eleventh Circuit found that Mr. Calvin had apparent authority to grant consent to the search of Mr. Bulgin's automobile.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant The Writ To Resolve The Conflict Among The Circuits As To Whether A Sentence Imposed In Excess Of The Statutory Maximum Invoked By The Elements Alleged In The Indictment And Found By The Jury, Exceeds The Jurisdiction Of The District Court And Therefore Constitutes *Per Se* Reversible Error.

The Fifth Amendment indictment clause states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." In *Russell v. United States*, 369 U.S. 749 (1962), the Court made clear that the Fifth Amendment requires that the indictment contain all of the elements of the offense intended to be charged, and that the grand jury's failure to state each element is not a "technical" deficiency." Rather it is inherently and necessarily prejudicial to a defendant:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by grand jury, as a prerequisite to a prisoner's trial for a crime, and

> without which the Constitution says—'no person shall be held to answer,' may be frittered away until its value is almost destroyed."

Id. at 770.

Admittedly, *Apprendi* was not a Fifth Amendment indictment clause case. Indeed, it was an appeal from a state prosecution, and the Court explained that the Fifth Amendment indictment clause had not been applied to the states *via* the Fourteenth Amendment. 120 S.Ct. at 2356 n. 10. Nevertheless, the Court cited with approval the Fifth Amendment analysis in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), *see* 120 S.Ct. at 2356 n. 3, where it previously acknowledged that *if* a "sentencing provision" actually defines a separate crime" "then the Government must write an indictment that mentions the additional element." *See Almendarez-Torres*, 523 U.S. at 226. Importantly, the Court acknowledged in *Apprendi* that "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment." *Apprendi*, 120 S.Ct. at 2359 n. 10.

The Eleventh Circuit, however, ignored this language from *Apprendi*. And it also ignored the well-settled rule that the omission of a crucial element from an indictment is a substantive, unwaivable, jurisdictional defect, requiring reversal without proof of prejudice. *See Stirone v. United States*, 361 U.S. 212 (1960) (deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"); *United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997) ("It is well established . . . that failure to recite an essential element of the offense in the indictment is not amenable to harmless error review"), *cert. denied*, 522 U.S. 1006 (1997); *United States v. Brown*, 995 F.2d 1493, 1505 (10th Cir.) ["F]ailure of the indictment to allege all the essential elements of an offense . . . is a jurisdictional defect

requiring dismissal . . . The absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment"), *cert. denied*, 510 U.S. 935 (1993)

In this case, the statutory scheme of Title 21 U.S.C. § 841 essentially creates three separate offenses for cocaine distribution, under three subparagraphs. Subparagraph (b)(1)(A) makes it illegal to distribute cocaine in excess of 5,000 grams. The statutory maximum for that offense is life. The mandatory minimum is 10 years. Subparagraph (b)(1)(B) makes it illegal to distribute cocaine in excess of 500 grams. The statutory maximum for that offense is 40 years with a mandatory minimum of 5 years. Subparagraph (b)(1)(C) makes it illegal to distribute cocaine in amounts not covered by subparagraphs (A) and (B). The statutory maximum is 20 years with no mandatory minimum.

In count one of the indictment, the government charged Mr. Bulgin with conspiracy to distribute cocaine. The government failed to charge in the indictment the amount of the cocaine attempted to be distributed. The indictment thus charged Mr. Bulgin with conspiring to commit the offense described in 21 U.S.C. § 841(b)(1)(C) and not with the crimes described in subparagraphs (A) or (B).[1] The jury found Mr. Bulgin guilty of an offense with a statutory maximum sentence of 20 years.

When the district court sentenced Mr. Bulgin to life imprisonment, the district court in essence sentenced Mr. Bulgin for committing a crime that was not charged in the indictment nor found by the jury beyond a reasonable doubt. Based upon

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[1] Referencing subparagraph (b)(1)(B) by letter and number in the indictment is not sufficient. An indictment "must set forth each element of the crime that it charges." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

the foregoing authorities, such a sentence is error *per se*. Accordingly, this court should grant the writ and reverse the decision below.

II. If The Court Determines That Plain Error Review Applies, It Should Grant The Writ To Resolve The Conflict Among The Circuits As To Whether The Imposition Of A Sentence In Excess Of The Statutory Maximum Necessarily Affects The Defendant's Substantial Rights And The Fairness And Integrity Of The Judicial Proceeding.

Following the *Apprendi* decision, the Fifth and Sixth Circuits have consistently vacated sentences for an enhanced offense whose elements were not charged in the indictment, and remanded for re-sentencing within the statutory maximum dictated by the offense charged in the indictment. Some panels of the Fifth and Sixth Circuits have simply reversed *per se* without any discussion of "plain error" or "harmless error" analysis. *See, e.g.*, *Burton v. United States*, 237 F.3d 490, 491 (5th Cir. Dec. 22, 2000) (life sentence exceeded maximum statutory penalty set forth in 21 U.S.C. § 841(b)(1), absent a showing of drug quantity or other sentence enhanceing factors; "We therefore vacate Burton's sentence and remand . . . for re-sentencing"); *United States v. Bandy*, 239 F.3d 802, 807 (6th Cir. 2001) (vacating *per se* enhanced minimum mandatory sentence that violated rule in *Castillo*); *United States v. Ramirez*, 242 F.3d 348, 351-352 (6th Cir. 2001) (vacating *per se* minimum mandatory 20-year sentence, imposed pursuant to 21 U.S.C. § 841(b)(1)(A), where drug quantity was not charged in the indictment; remanding for re-sentencing under 21 U.S.C. § 841(b)(1)(C) and in accordance with Sentencing Guidelines).

Other panels of the Fifth and Sixth Circuits apply "plain error" analysis, but find that an illegal enhanced sentence (requiring a defendant to serve more time than authorized in jail) necessarily affects "substantial rights" and is necessarily

reversible as "plain error." *See United States v. Meshack*, 225 F.3d 556, 577-578 (5th Cir. Aug. 28, 2000) (vacating life sentences and supervised release terms based upon "plain error," where life sentences and supervised release terms exceeded the statutory maximum in § 841(b)(1)(C); stating with regard to the "affecting substantial rights" prong of the "plain error" test: "in sentencing cases we have generally determined prejudice by considering whether the alleged error resulted in an increased sentence for the defendant"); *United States v. McWaine*, 243 F.3d 871, 875-876 (5th Cir. 2001) (vacating life sentence for cocaine offense even though defendant had concurrent twenty year sentence on another count; "Since his sentences are to run concurrently, the life sentence will affect the time he must serve in prison and we cannot rely on the plain error analysis to affirm his sentence"); *United States v. Page*, 232 F.3d 536, 544 (6th Cir. Nov. 9, 2000) (applying "plain error" review to sentence above statutory maximum of § 841(b)(1)(C); holding "an error affects substantial rights when the error was prejudicial, that is, when it "affected the outcome of the district court proceedings;" "There is no doubt that imposing additional years of imprisonment beyond that authorized by a jury's verdict affects a defendant's substantial rights;" "Furthermore, a sentencing error seriously affects the fairness, integrity, or public reputation of judicial proceedings when a court's error results in imposition of a sentence which is not authorized by law;" vacating as "plain error," 30-year sentenced where statutory maximum under § 841(b)(1)(C) was 20 years).

Thus, even if traditional plain error analysis applies to a sentence above the statutory maximum, the Court should hold—consistent with the view of the Fifth and Sixth Circuits—that such a sentence necessarily affects a defendant's "substantial rights." *See, e.g., Meshack*, 225 F.3d at 577-578 ("in sentencing cases we have generally determined prejudice by considering whether the alleged error resulted in an

increased sentence for the defendant"); *see also Glover v. United States*, 121 S.Ct. 696, 701 (2001) (*any* increased prison term resulting from counsel's failure to raise a proper challenge at sentencing, is "prejudice" to a defendant under *Strickland v. Washington*, 466 U.S. 668 (1984); refusing to impose a more onerous "prejudice" burden on collateral review because the sentence "result[ed] from a ruling which, if it had been error, would have been correctable on direct appeal"). Clearly, the indictment as drawn was fatally defective, and jurisdictionally deficient to the extent the government sought the enhanced penalties of §§ 841(b)(1)(A). But even if plain error review applies, the sentence should have been reversed and the case remanded for re-sentencing.

In addition, the Court should reverse the sentence in this case even if the Court adopts the plain error analysis employed by the Eleventh Circuit below. In the opinion below, the Eleventh Circuit found that the evidence was overwhelming that the conspiracy involved a sufficient amount of cocaine to support the imposition of a life sentence. This finding is clearly erroneous.

The jury acquitted Mr. Bulgin of possessing cocaine with intent to distribute on March 3, 2000. It cannot be said with any degree of certainty that the jury necessarily found that Mr. Bulgin conspired with Calvin to distribute the 90 kilograms of cocaine which was found in the Bulgin's vehicle. The other evidence relating to the conspiracy count was all testimonial and both witnesses had reasons to embellish their testimony. Therefore, the evidence with respect to the amount of cocaine involved in the conspiracy is not overwhelming and the Eleventh Circuit clearly erred in finding to the contrary.

III. The Court Should Grant The Writ To Determine Whether A Law Enforcement Officer Has A Good Faith Basis To Believe A Third Party Has Apparent Authority To Give Consent To Search A Vehicle When The Police Officer Knew That The Third Party Did Not Own The Vehicle And The Third Party Was Not In Actual Possession Of The Vehicle When The Police Officer Obtained Consent.

The validity of consent given by a third-party to search property owned by another depends upon whether the third-party possessed common authority over or some other significant relationship to the property to be searched. *United States v. Matlock*, 415, 164, 94 S.Ct. 988 (1974). The authority which justifies the third-party consent rests upon mutual use of the property by persons having joint access and control for most purposes. *Matlock*, 94 S.Ct. at 993, n.7.

The *Matlock* "joint access or control" test is applicable to third-party consent to the search of a vehicle. *United States v. Dunkley*, 911 F.2d 522 (11th Cir. 1990). However, the doctrine of third-party consent must be applied guardedly to prevent the erosion of the Fourth Amendment, since there is no requirement of probable cause and the exception is not base upon necessity. *United States v. Masurkiewicz*, 431 F.2d 839, 843 (3rd Cir. 1970). Under the rationale of Matlock, a third party in sole possession and control of the vehicle clearly has the authority to consent to its search. *Dunkley*, 911 F.2d at 526, citing *United States v. Morales*, 861 F.3d 396, 399 n. 8 (3rd Cir. 1988). Accordingly, court's generally find valid a third-party's consent to search a vehicle when the third-party is the driver of the vehicle. *See e.g., United States v. Diaz Albertini*, 772 F.2d 654 (10th Cir. 1987).

In this case, Mr. Calvin was not driving the vehicle when the request for the search was made. Consequently, he neither possessed nor controlled the vehicle at the time of the search.

Mr. Calvin was given the limited authority to park the vehicle until Mr. Bulgin reclaimed it. Mr. Calvin's possession of the keys to the vehicle at the time of the search did confer upon him the authority to waive Mr. Bulgin's rights under the Fourth Amendment. *See Mazurkiewicz*, 431 F.2d at 844. Any authority Mr. Calvin had over the vehicle ceased after he parked the vehicle.

In addition, the law enforcement officer knew that Mr. Calvin did not own the car and that Mr. Bulgin was the owner. Therefore, the officer had no good faith basis to believe that Calvin had authority to consent to the search and the cocaine seized from the trunk of Mr. Bulgin's vehicle should have been suppressed. The error is not harmless because the cocaine seized from Bulgin's vehicle was the only cocaine introduced at trial. It is highly unlikely that the jury would have convicted Mr. Bulgin without any cocaine being introduced into evidence. Therefore, this Court should vacate Mr. Bulgin's conviction and remand for new trial.

IV. The Court Should Grant The Writ To Determine Whether The Imposition Of An Enhanced Sentence For Illegally Reentering The United States After Deportation Pursuant To 8 U.S.C. § 1326(B)(2), Violates The Fifth And Sixth Amendments In Light Of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) When The Indictment Failed To Allege That The Deportation Was Subsequent To A Conviction For An Aggravated Felony?

In this case, count three of the indictment charged that Mr. Bulgin was found in the United States without the Attorney General's express consent after having previously been deported. This offense is codified at 8 U.S.A. § 1326(a) and is punishable by a maximum term of imprisonment of 2 years. However, because the pre-sentence investigation report

determined that Mr. Bulgin was convicted of an aggravated felony prior to his deportation, Mr. Bulgin was sentenced to a term of imprisonment in excess of 2 years.

The offense for which Mr. Bulgin was sentenced is codified at 8 U.S.C. § 1326(b)(2) and is punishable by a maximum penalty of twenty years. Because the indictment failed to allege that Mr. Bulgin was deported subsequent to an aggravated felony, Mr. Bulgin was sentenced for committing an offense which was not alleged in the indictment nor admitted by Mr. Bulgin at his change of plea hearing.

While this Court has previously rejected the argument that the statutory scheme of § 1326 creates two separate offenses with separate statutory maximums and that the prior "conviction for commission of an aggravated felony" is a necessary element of the offense created by § 1326(b)(2). *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court's decision in *Apprendi* has called into doubt the constitutional validity of the *Almendarez-Torres* decision. In *Apprendi,* the Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction must, be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490. However, the Court acknowledged that the "prior conviction" exception in its holding was a narrow exception to the general rule and that it was arguable that the logical application of the reasoning in *Apprendi* should apply if the prior conviction issue was contested. *Id.* at 489.

The Court reasoned in *Apprendi* that the Due Process Clause and the Sixth Amendment right to a trial by jury entitle a criminal defendant to a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Id.* at 476-77. The Court explained that any distinction between an element and a sentencing factor was unknown to the practice of

criminal indictment, trial by jury and judgment by court during the years surrounding the founding of the Nation. *Id.* at 478. The Court further explained that as a general rule the indictment contained all the facts and circumstances which constitute the offense, stated with such certainty and precision, that the defendant be enabled to determine the species of the offense and in order that there may be no doubt as to the judgement which should be given. *Id.* The Court concluded that a judge's role in sentencing was constrained at its outer limits by the facts alleged in the indictment and found by the jury. *Id.* at 483, n.10.

The Court characterized the holding in *Almendarez-Torres* as at best an exceptional departure from historic practice. *Id.* at 487. The Court reasoned that because the *Almendarez-Torres* defendant did not challenge the fact of the prior aggravated felony at his plea hearing, the due process and Sixth Amendment concerns in allowing the judge to determine a fact which increased the punishment beyond the statutory maximum were mitigated. *Id.* at 488. In addition, the Court found no reason to revisit *Almendarez-Torres* in that the *Apprendi* defendant was not contesting the validity of the *Almendarez-Torres* decision. *Id.* at 490.

In the instant case, Mr. Bulgin did not admit to being convicted of a prior aggravated felony prior to his deportation and objected to the enhance sentence pursuant to 8 U.S.C. § 1326(b)(2) at the earliest available opportunity. Accordingly, due process and Sixth amendment concerns are implicated because the fact of the prior aggravated felony conviction was not alleged in the indictment and that fact increased the potential penalty for the offense of conviction from 2 years to 20 years imprisonment.

Under the reasoning of *Apprendi*, the fact of the prior aggravated felony conviction is an essential element of the offense described in 8 U.S.C. § 1326(b)(2). Therefore, it must be properly charged in the indictment. *See Apprendi*,

530 U.S. at 489 n.15. Accordingly, the sentence in this case was imposed in violation of Mr. Bulgin's rights under the Fifth and Sixth amendments, and must be vacated.

CONCLUSION

Based upon the foregoing petition, the Court should grant a Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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